United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7445

To be argued by
SHELDON S. LUSTIGMAN

The

United States Court of Appeals

For The Second Circuit

FRAMEN STEEL SUPPLY COMPANY, INC.,

Plaintiff-Appellant,

vs.

PHILIPS INDUSTRIES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

BASS, ULLMAN & LUSTIGMAN
Attorneys for Plaintiff-Appellant
747 Third Avenue
New York, New York 10017
(212) 751-9494

(10259)
LUTZ APPELLATE PRINTERS, INC.
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In The

UNITED STATES COURT OF APPEALS

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Civil No. 76-7445

FRAMEN STEEL SUPPLY COMPANY, INC.

Plaintiff-Appellant,

vs.

PHILIPS INDUSTRIES, INC.,

Defendant-Appellee.

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for the Southern District of New York

APPELLANT'S BRIEF

ISSUES PRESENTED FOR REVIEW

I.

Whether the District Court erred in dismissing the complaint for lack of personal jurisdiction and ruling that Appellee was not doing business in New York within the meaning of New York CPLR §301.

II.

Whether the District Court erred in dismissing the

complaint for lack of personal jurisdiction and ruling that Appellee was not transacting business in New York within the meaning of New York CPLR §302(a)(1).

STATEMENT OF THE CASE

This is an appeal from an order of the Honorable Whitman Knapp, dismissing Appellant's complaint for lack of personal jurisdiction. The action, which is based on diversity of citizenship, seeks to recover damages sustained by Appellant (a broker) as a result of Appellee's cancellation of a contract for the purchase of substantial quantities of raw steel.

Plaintiff-Appellant, Framen Steel Supply Company, Inc. ("Framen"), is a New York corporation, with its offices located at the World Trade Center in New York. Framen acts as a broker and agent arranging for the purchase and sale of various types of raw steel products. Framen is a small company with only four employees (Deposition of Ruben Polne, 173a).*

Defendant-Appellee, Philips Industries, Inc. ("Philips"), is an Ohio corporation, with its principal place of business in Ohio. Philips has offices in various parts of the United States. It manufactures various heating, cooling and humidifying equipment as well as various components for housing and recreational vehicles. (Deposition of Donald D. Hinman, Jr. 83a-85a).

Prior to the matters in suit, Philips had arranged for

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* "a" references are to the Joint Appendix herein.

13 different shipments of steel through Framen totaling approximately three-quarters of a million dollars (affidavit of Polne, ¶2, 40a). Thereafter, on three separate occasions, Philips called Framen in New York to have Appellant arrange for the manufacture of substantial quantities of steel to be specifically manufactured and cut to Philips' detailed specifications (Polne affidavit ¶2, 40a). This steel was to be manufactured to a size and gauge which was not normal in the steel industry, but was customized for Philips' needs. (Polne deposition, 223a).

Customers' orders in the steel industry are accepted and acted on verbally, similar to that of a stock broker (Polne, 184a). This is because time is of the essence in order to obtain an allocation of a quota from the steel mill and because of rapidly changing price conditions. (Polne, 184a, 195a, 228a). Philips' verbal orders were accepted and they were later confirmed by written purchase orders. (Polne, 183a).

Appellant arranged for the manufacture of the steel through Okaya, Inc., a representative or agent of a Japanese steel mill. Okaya is located in New York, with offices at the World Trade Center. Okaya was advised that the steel was being made for Philips (Polne, 220a, 223a). Polne orally advised Philips of the available price which Philips agreed to (Polne, 221a).

After the steel had been specially manufactured, Philips cancelled the order. (15a, 16a, 20a). Although Philips' written confirmation of its verbal purchase order provided that in the event of a cancellation an equitable adjustment would be

made, Philips refused to make any payment, and this suit followed. Framen sued to recover damages based on breach of contract, as well as damages for loss of good will and injury to its business reputation which it sustained in New York with Okaya as a result of defendant's cancellation.

Although Philips has no office in New York, the totality of circumstances surrounding Philips' myriad of activities in New York demonstrates that Appellee has regularly availed itself of the privilege of conducting substantial business in New York and should be subject to suit here.

Philips maintains a dividend account in New York with Morgan Guaranty & Trust Company. Dividends on its common and preferred shares of stock are mailed from New York and the checks are prepared in New York. (Affidavit of Sheldon S. Lustigman, 46a).

Philips' stock is traded on the New York Stock Exchange. Morgan Guaranty & Trust Company of New York is both the registrar and the transfer agent for Philips' stock.

Philips has three full-time sales employees who reside in New York (Affidavit of Paul Cline, 78a) who are responsible for the conduct of substantial business activity in New York. Mr. Donald Hinman, vice president of marketing for the Lau division, which manufactures fans and blowers for heating, ventilating and air conditioning equipment, explained that sales in New York occur in various ways. Its New York resident salesman,

John Schuster, makes sales of the motors and blowers to original equipment manufacturers, i.e., those who use these components as part of the manufacture of the entire air conditioner, furnace, etc. (Hinman, 84a). Its New York salesman is one of only ten over the entire country (Hinman, 89a).

Between three and five percent of this division's annual sales to original equipment manufacturers are made in New York. These sales are made to six principal and 15-20 other original equipment accounts in New York. (Hinman, 93a, 94a).

The Lau division also makes extensive sales of replacement and service parts in New York. These sales are made through two manufacturers' representatives located in New York and another representative located in Pennsylvania who sells to New York (Hinman, 101a-104a). These manufacturers' representatives warehouse a supply of Philips' parts in New York in order to supply the trade (Hinman, 89a, 99a, 100a). The Bayley Propellair division also sells industrial ventilating fans in New York through three New York manufacturers' representatives. (Hinman, 105a,106a).

The New York sales of the Lau division accounts for annual sales in New York of approximately $1,350,000. (Hinman, 93a, 94a). The Lau division also sells a line of residential humidifiers under Philips' name through Sears. These sales amount to a total of about five million dollars per year (Hinman, 93a). Philips drop ships these humidifiers to the various Sears distribution centers, including those located in New York (Hinman, 96a).

In addition to the extensive New York sales made by the Lau division, James Hornberger, Regional Sales Manager of the Mobil Home Recreational Division, who covers the New York area, testified that for just the preceding six-month period, his division made approximately $900,000 in sales for New York to four principal New York manufacturing accounts and 10 to 12 other New York accounts (Hornberger,144a). This division also deals through manufacturers' representatives in New York who stock replacement parts for Philips' products (Hornberger,147-148a).

Not only do these two divisions make millions of dollars of annual sales in New York, as well as have their parts stocked by representatives here, but, in addition, other Philips' personnel regularly come to New York on a sales support basis, a service basis and a consulting basis. (Hinman,120a).

Mr. Hinman testified that qualified Philips' personnel are sent to New York to inspect the products when something goes wrong. Other Philips' personnel also work closely in New York with engineers from original equipment manufacturers in order to accommodate the design of the Philips' components to the finished product. Specialists are sent to New York with technical information not available to the Philips New York salesman, to match the design of the Philips blower or fan to the design of the customer's product. Furthermore, other Philips marketing personnel, including Mr. Hinman, come to New York to maintain a high-level good will relationship with executives of their customers.

Henry Seebach, the general marketing manager, comes to New York to meet with the principal original equipment manufacturing accounts. Philips also sends Jim Schweir, its senior product manager, to New York to provide technical expertise to its accounts. Whenever service problems develop, Clarence Repp, the quality control manager of the Dayton Plant, comes to New York to resolve them (Hinman 122-124a). Mr. Hornberger, the Regional Manager for the Mobil Home Division, comes to New York when engineering problems arise (Hornberger, 153a).

Various Philips representatives also come to New York to attend trade association meetings (Hinman 125a). Philips also advertises in various trade journals distributed in New York and engages in cooperative advertising programs (Hinman, 112a, 117a; Hornberger, 157a, 158a).

The District Court ruled that the totality of the foregoing New York contacts was insufficient to create personal jurisdiction. It is respectfully submitted that this ruling was erroneous.

ARGUMENT

POINT I

PHILIPS IS DOING BUSINESS IN NEW YORK WITHIN THE MEANING OF NEW YORK CPLR §301

Since this is an action based on diversity of citizenship, Rule 4(e), Federal Rules of Civil Procedure provides that the service of a summons may be made in a manner prescribed by the

laws of the forum state, and personal jurisdiction is to be determined according to the laws of the forum state. Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963). New York CPLR §301 provides:

> "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

In Manchester Modes, Inc. v. Lilli Ann Corporation, 306 F.Supp. 622 at 624, 625 (SDNY, 1969), Judge Tenney noted:

> "No precise test exists for determining whether a foreign corporation is 'doing business' within New York State. CPLR §301. Each case must depend upon its own facts, and the sole requisite is a finding that defendant is engaged in such a 'continuous and systematic course of "doing business" here as to warrant a finding of its "presence" in this jurisdiction.' Frummer v. Hilton Hotels International, Inc., 19 NY2d 533, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967).
>
> The issue in every case is whether the nature of the foreign corporation's contacts with the judicial district in which it is sued is sufficient to justify subjecting it to suit in that district, and the test for resolving this issue should be a pragmatic one."

Although the defendant had no office in New York, it employed New York salesmen and also, like Philips, employed independent firms to perform services for it. Judge Tenney noted that defendant's president visited New York several times a year for business purposes and that defendant advertised its products in

several magazines which were distributed in New York. 306 F.Supp. at 626. In denying defendant's motion to dismiss for lack of personal jurisdiction, Judge Tenney ruled:

> "While 'mere solicitation' of business for an out-of-state concern is not enough to constitute 'doing business', due process requirements are satisfied if the defendant foreign corporation has certain minimum contacts with this district such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945); Frummer v. Hilton Hotel International, Inc., supra. In making such determination, it is important not to isolate each contact of the defendant with New York and say that each such contact does not constitute 'doing business'. 'The court must look to the cumulative significance of all these activities in order to decide the question.' Potter's Photographic Applications Co. v. Haling Corp., 292 F.Supp. 92, 100 (E.D.N.Y. 1968). I think it clear, from the record before me, that when there exists solicitation of orders coupled with evidence of other activities conducted in this State, defendant is 'here' in such a sense and in such a degree as to subject the corporation to the jurisdiction of this court."
> 306 F.Supp. at 626.

Regular maintenance of a sales force within the State, if of sufficient magnitude, is itself sufficient to constitute the "doing of business" in the State, even in the absence of any office, bank account or telephone listing in the corporate name within the State. Grunder v. Premier Industrial Corp.,

12 A.D.2d 998, 211 N.Y.S.2d 421 (4th Dept. 1961).

Similarly, in the leading case of International Shoe Company v. Washington, 326 U.S. 309 (1945), the appellant had no office in Washington nor did it make any contracts for either the sale or the purchase of merchandise there. And, unlike Philips, which also uses manufacturers' representatives in the State to stock replacement parts for it, appellant there had maintained no stock of merchandise in the State, 326 U.S. at 313. Rather, it merely had resident salesmen who solicited orders and occasionally rented sample rooms. All orders were transmitted to the home office and shipped f.o.b. from points outside of Washington. The Court found that such regular and systematic solicitation of orders in the State resulting in a continuous flow of the products into the State was sufficient to constitute doing business. Id. at 314, 315.

Here, not only do Philips' resident New York salesmen make millions of dollars of annual sales, which are then shipped into the State, but numerous other Philips' personnel regularly come to New York for sales support, service, consulting, technical engineering, product development planning, trade association meetings (Hinman, 120a-124a), as well as advertising its products in trade journals distributed in New York and engaging in cooperative advertising programs here (Hinman 112a, 117a; Hornberger, 157a, 158a).

It is submitted that these activities which are essential for Appellee's ability to design and sell its components to

original equipment manufacturers, constitute more than "occasional good will and sales supporting trips to New York," as characterized by the District Court (256a).

In addition to its own resident salesmen, Philips uses manufacturers' representatives located in New York to stock replacement parts necessary for the proper maintenance of the equipment which it sells in New York (Hinman, 89a, 90a; Hornberger, 147a-149a).

The District Court ruled:

> "Plaintiff's most colorable argument concerns the manufacturers' representatives, but it has failed to establish that these independent representatives' function is so essential that without them, defendant would be forced to bring its own employees in to perform that function...." (257a)

It is respectfully submitted that the very nature of Appellee's business, which consists of selling items such as fans, blowers and motors to original equipment manufacturers in New York who utilize such products in the manufacture of their furnaces, air conditioners, etc., requires a ready source of replacement parts which Philips would have to supply itself if these representatives were not available to stock such products for it. Such sales to the New York representatives constitute a substantial part of Philips' operation (Hinman, 89a, 90a, 95a, 99a, 100a, 104a-106a). It is submitted that if such representatives were not used, it is obvious that Philips would have to establish its own facilities in New York to provide for this replacement parts service.

In Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967), cert. den., 390 U.S. 996 (1968), this Court held that a foreign corporation will be deemed to be doing business here, insofar as personal jurisdiction over it is concerned when it has representatives in New York who provide those services which the foreign corporation would itself have to perform in the absence of such representatives. See also SCM Corporation v. Brother International Corporation, 316 F.Supp. 1328 (DC,SDNY 1970); Frummer v. Hilton Hotels International, Inc., 19 NY2d 533, 281 NYS2d 41 (Ct. of Appeals 1967).

It is respectfully submitted that the District Court further erred in discounting the significance of the $1,350,000 annual sales to New York customers of the Lau division as constituting only approximately 1% of its annual sales. This is not the appropriate test. In Fashion Two Twenty, Inc. v. Steinberg, 339 F.Supp. 836, 841 (E.D.N.Y. 1971), Chief Judge Mishler noted:

> "It is also quite clear that in considering the substantiality of business, the dollar amount is to be viewed from the standpoint of the average businessman, rather than from that of the corporate giant. Green v. United States Chewing Gum Mfg. Co., 224 F.2d 369, 372 (5th Cir. 1955); and Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F.Supp. 252 (E.D.Pa. 1968)."

In considering the totality of the circumstances presented, the district court also overlooked the substantial prior course of dealing between the parties. Between March 15, 1973 and

October 30, 1974, Framen had arranged for approximately three-quarters of a million dollars worth of steel to be manufactured for Philips (Affidavit of Polne, ¶2,40a). The purchase orders in suit were thus not just isolated transactions, but part of a course of dealing.

In determining whether a foreign corporation is "present" to satisfy due process requirements for the maintenance of suits against it, it is also relevant to consider an "estimate of the inconveniences which would result to the corporation from a trial away from its 'home' or principal place of business." International Shoe Co. v. Washington, supra, 326 U.S. at 317.

Here Framen is a small corporation with only four employees. Philips, on the other hand, is a giant New York Stock Exchange corporation with offices and agents throughout the United States and abroad. Philips makes millions of dollars of annual sales in New York through resident salesmen and manufacturers' representatives who warehouse vital replacement parts for it. Philips regularly and systematically ships its products into the state and sends representatives here for sales support, servicing, high level planning meetings and consulting sessions to work closely with its New York manufacturing customers. It should not be heard to complain that it is not sufficiently "present" here to defend this litigation which arises out of its cancellation of materials ordered and produced to its special requirements through Appellant, with whom it had a substantial prior course of dealing.

POINT II

PHILIPS IS TRANSACTING BUSINESS IN NEW YORK WITHIN THE MEANING OF NEW YORK CPLR §302(a)(1)

New York CPLR §302 provides in pertinent part:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent:
>
> 1. transacts any business within the State;"

The District Court herein correctly noted that "making a telephone call to New York to place an order without more is not enough to bring defendant within the ambit of this section." (256a , emphasis added). It is respectfully submitted, however, that the District Court erred in misapplying this principal to the undisputed facts of the instant case, since the custom of the steel market and the prior substantial course of dealing between the parties constitutes much more than the mere placing of a telephone order.

The undisputed evidence is that a steel broker is similar to a stock broker, and that the custom of the industry is for orders to be placed and acted upon verbally because time is of the essence in order to obtain allocations of manufacturing quotas and proper prices in a rapidly fluctuating market. (Polne,184,228a). Philips later confirmed its agreement by forwarding a written confirmation (Polne,183a). Framen obtained

an acceptable price and agreement to have the steel produced, from Okaya (USA) Inc., a Japanese steel trading company located in New York City (Polne affidavit ¶2, 40a). This occurred on three separate occasions in the matters at suit.

These telephone orders must also be viewed against the background of the prior substantial course of dealing between the parties. For over a one-year period prior to the matters in suit, Philips had used Framen, a broker of steel products, to arrange for thirteen different shipments of steel totalling appoximately three-quarters of a million dollars to be manufactured for Philips (Polne affidavit, ¶2, 40a). The mere fact that the orders were placed by Philips by telephone, rather than in person, is not the determining factor.

Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.S. 2d, 337 (Ct. of Appeals, 1970), is one of the leading cases establishing the validity of long-arm jurisdiction, where a defendant transacts business in the state via the telephone. In the Parke-Bernet case, defendant desired to bid at an auction being conducted by the plaintiff. In this regard, a telephone line was established wherein he could place his bid at the plaintiff's galleries while the auction was taking place. In holding that such telephone business was sufficient to subject the non-resident to jurisdiction under CPLR §302, the Court of Appeals noted as follows:

> "It is important to emphasize that one need not be physically present in order to be subject to the jurisdiction of our courts under CPLR 302 for, particularly in this day of instant long-range communications, one can engage in extensive purposeful activity here without even actually setting foot in the State. (See International Shoe Co. v. Washington, 326 U.S. 310, 316-317, 66 S. Ct. 154, 90 L. Ed. 95, supra; Lewin v. Bock Laundry Mach. Co., 16 N.Y. 2d 1070, 266 N.Y.S. 2d 391, 213 N.E. 2d 686; Benedict Corp. v. Epstein, 47 Misc. 2d 316, 262 N.Y.S. 2d 726). Any implication, in older cases, that physical presence was a necessary factor in obtaining jurisdiction over nonresidents was expressly rejected by the Supreme Court in the International Shoe case - the case which provided the constitutional authority for CPLR 302 - where the court wrote (326 U.S., at pp. 316-317, 66 S. Ct., at p. 158); "The terms 'present' and 'presence' are used merely to symbolize those activities * * * which courts will deem to be sufficient to satisfy the demands of due process." 26 N.Y.2d at 17

In Margaret Watherston, Inc. v. Forman, 342 N.Y.S.2d 744 (App.Term, 1st Dept., 1973), plaintiff, a New York resident, was engaged in the business of restoring valuable paintings. Defendant, an Illinois resident, telephoned plaintiff from Chicago, and asked plaintiff to perform certain restorations on a painting. Defendant sent the painting to plaintiff in New York, and later refused to pay. In sustaining jurisdiction over the non-resident defendant under CPLR §302(a), the court ruled that since the plaintiff had performed the work on

defendant's behalf in New York, there was sufficient reasonable contacts with New York which would warrant subjecting the non-resident to personal jurisdiction, in a suit to recover the value of the services performed. The court noted that although isolated telephone transactions or orders mailed from out of state would be insufficient to subject a non-resident to jurisdiction, such orders, in combination with the rendition of services here, or the shipment of goods here from out of state, would be sufficient to support jurisdiction.

See also Engelhardt v. Shields and Company, 269 N.Y.S.2d 238 (Dist.Ct., Nassau 1966), where the court held that jurisdiction could be maintained over a stockbroker who did not reside in the county, nor maintained any place of business within the county where he regularly conducted business within the county by telephone during an eleven-month period, buying and selling on behalf of customers within the jurisdiction.

Similarly, in Hanley Accounting, Inc. v. OKC Corporation, _____N.Y.S.2d_____, N.Y. Law Journal, June 23, 1975,p.2, col. 4, a copy of which is set forth in the addendum hereto, the court ruled that where defendant, a resident of Texas placed an advertisement in the help wanted sections of the New York newspapers and plaintiff, a New York employment agency, sent defendant resumes of potential candidates for the position and discussed the matter with defendant by phone, defendant had sufficiently transacted business within the jurisdiction, and was subject

to in personam jurisdiction under the long arm statute in a suit brought by the employment agency for its fees.

In light of the above, it is respectfully submitted that Appellee "transacted business" in New York giving rise to the instant cause of action, and that it is therefore subject to jurisdiction in this forum.

CONCLUSION

The totality of circumstances surounding Philips' myriad of activities in New York leads to the inevitable conclusion that Philips has regularly availed itself of the privilege of conducting business in New York and should thus be subject to suit here. The millions of dollars of annual sales in New York emanating from its New York resident salesmen; its continuous shipments of goods within the state; its use of manufacturers' representatives here to perform vital warehousing functions for selling replacement parts; its extensive sales support activities in regularly sending engineers and technical and service personnel into the state to design and service the products which it sells here; its visits by other marketing personnel to maintain high level business contacts; its attendance at trade shows in New York; its advertising in journals distributed in New York and cooperative advertising ventures with New York accounts; its substantial prior purchases of steel from plaintiff as well as the purchases in suit under circumstances where

the custom of the market is for orders for raw steel to be verbally placed; its maintenance of a securities dividend account; and its use of a New York registrar and transfer agent and having its stock traded on the New York Stock Exchange, all clearly indicate that Philips has gone far beyond "mere solicitation" and has purposefully availed itself of the privilege of conducting business in New York in a very real sense. As such, it is entitled to the benefit of protection under our laws, and should not be heard to complain that a Federal Court in New York does not have jurisdiction over its person.

For all of the foregoing reasons, it is respectfully submitted that the order of the District Court should be reversed.

Respectfully submitted,

BASS, ULLMAN & LUSTIGMAN
Attorneys for Plaintiff-Appellant

NEW YORK LAW JOURNAL—Monday, June 23, 1975

Justice Asclone

HANLEY ACCOUNTING, INC. v. OKC CORP.—Defendant moves to dismiss the complaint pursuant to CPLR 3211(a) for lack of personal jurisdiction. Plaintiff, Hanley Accounting, Inc. (Hanley) seeks damages arising out of an alleged contract between it and defendant OKC Corp. Plaintiff is a domestic corporation operating as an employment agency. Defendant, a foreign corporation, claims there is no predicate for jurisdiction under either CPLR 301 or 302.

The facts underlying this dispute are as follows: OKC placed an advertisement in the New York Times seeking applicants for a position in its firm. Plaintiff responded from New York to the advertisement, notifying defendant that it had resumes of qualified applicants. Defendant through James Pajack, a vice-president, in Dallas, Texas, then notified Hanley in New York that it was interested in reviewing the applicants' resume. Shortly thereafter, upon review of the resumes, Pajack called Hanley in New York and expressed an interest in one of its applicants, Russell Dean Smith. Pajack directed Hanley in New York to contact Smith to arrange an interview for him with Pajack. There were further communications between Pajack in Dallas and Hanley in New York relating to Pajack's activities on behalf of defendant to secure Hanley's services by setting up an interview with Smith. Within a matter of days, Smith was interviewed by Pajack and hired by defendant. Plaintiff alleges that although defendant was notified of the agency's fee arrangement in one of the initial communications between the two parties, and accepted it by offering no objections, defendant refused to pay the $6,000 fee to plaintiff after Smith was hired by defendant. Defendant alleges that it also received Smith's resume from a California employment agency and that the Dallas office of that agency arranged the interview with Smith that resulted in his hiring.

The basic facts of defendant's dealings with Hanley however, remained undisputed. These are: The placement of the "ad" in a New York paper, the solicitation of New York applicants for the job and the negotiating for and alleged acceptance of the services of the New York plaintiff through letters and phone calls. The foregoing facts establish that defendant transacted business in New York from which this claim arose and, therefore constitute a sufficient predicate for jurisdiction under CPLR 302(a) (1). The facts in this case, at the very least, are as compelling for jurisdictional purposes as the facts in Park-Bernet Galleries, Inc. v. Franklyn, 26 N.Y. 2d 13. In Park-Bernet, supra, the court held that the California defendant had purposefully projected himself into the New York transaction by communicating through an open telephone line from California to New York in the bidding at a New York auction. That alone, the court held, was a sufficient predicate for jurisdiction under 302(a) (1).

There being a sufficient predicate for jurisdiction over the person of defendant OKC, the motion to dismiss is denied. Defendant's purported application for summary judgment—made in its reply papers—is denied, it being improperly before the court.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND DEPARTMENT

FRAMEN STEEL SUPPLY CO., INC.,
Plaintiff-Appellants

- against -

PHILIPS INDUSTRIES, INC.,
Defendant-Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 310 West 146th Street, New York, New York,

That on the 15th *day of* December *19* 76 *at* 48 Wall St. New York, N.Y.

deponent served the annexed brief *upon*

Sullivan & Cromwell

the **attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 15th
day of December *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in Queens County
Commission Expires March 30, 1978

James A. Steele

Print name beneath signature

JAMES A. STEELE